RE EX PARTE APPLICATION OF RIDZWAN IBRAHIM (PRESUMPTION OF DEATH)

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[ORIGINATING MOTIONS NO: S7-25-8-2002]
27 AUGUST 2002

EVIDENCE: *Presumption - Death - Person missing for more than seven years - Declaration to presume person dead - Application for - Evidence Act 1950, s. 108 - Burden of proof - Whether there was evidence to prove person's whereabouts unknown - Syariah laws - Application involved a Muslim - Whether matter within jurisdiction of Syariah Court*

The applicant applied to this court for a declaration that his relative, one Sheikh Mohamed, be presumed dead. Affidavits were tendered from those related to the said Sheikh to prove that efforts to secure information as to whether he was alive or dead had been unsuccessful.

The main issue in this matter was whether the said Sheikh could be presumed dead as no one close to him could ascertain whether he was alive. However, in considering the said application, this court saw it fit to comment on whether the present matter fell within the jurisdiction of the Syariah Court as firstly, the said Sheikh was a Muslim and the reason for the application was for the applicant to obtain letters of administration in relation to the said Sheikh's estate in absence of a will.

Held:

[1] Evidence disclosed that the applicant's father had failed in his efforts to obtain a death certificate of the said Sheikh. It was also indicated that the daughters of the said Sheikh had made a disclaimer to the assets of the latter which were situated in Malaysia. Such a conduct would not have been inconsistent with the said Sheikh being alive. Further affidavits from the applicant's relatives disclosed that the said Sheikh had left Malaysia for Saudi Arabia and had passed away. But attempts made by them to secure a death certificate have thus far been unsuccessful. (pp 505 f, h-i, 506 a, 514 b-d & 516 f-g)

[2] This court had the option of not making an order on the present application in view of the existence of a similar provision under the Syariah Court Civil Procedure (Federal Territories) Act 1998. However, granting this application would not be repugnant to the implementation of the 1998 Act. In allowing the application sought under s. 108 of the Evidence Act, consideration was also given to the fact that the period

stipulated under the said section was for a longer period than provided for under s. 80 of the Syariah Court Evidence (Federal Territories) Act 1997 or the Syariah Evidence Enactment 1991, thereby more than amply providing grounds to satisfy the requirement thereunder. (pp 513 d-e & 516 a-b, g-h)

Obiter:

[1] By virtue of s. 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993, the civil jurisdiction of the Syariah Court extends to matters which relate to the division and inheritance of testate or intestate property, as well as the determination of persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled to. However, it was pertinent to note that in absence of specific provisions under the Administration of Islamic Law (Federal Territories) Act 1993 and Syariah Court Civil Procedure (Federal Territories) Act 1998 concerning matters of probate and administration, an applicant would still have to resort to the jurisdiction of the civil court. (p 514 a-d)

[2] Presently, Muslims now have to countenance a choice of two options in respect of an application for presumption of death, *ie*, under s. 108 of the Evidence Act 1950 or s. 80 of the Syariah Court Evidence (Federal Territories) Act 1997. (pp 511 h & 513d)

[Application granted.]

Case(s) referred to:

Goodwin v. Phillips [1908] 7 CLR 1 ***(refd)***

Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan (No 2) [1991] 3 MLJ 487 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(refd)***

Re Gun Soon Thin [1997] 2 CLJ (Supp) 53 ***(refd)***

Re Berchtold [1923] 1 Ch 192

Re A Penhas (deceased) [1947] MLJ 78 ***(refd)***

Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, ss. 2, 46(2)(b), 80

Administration of Islamic Law (Negeri Sembilan) Enactment 1991, s. 41(2)(b)(viii), (ix)

Distribution Act 1958, s. 4

Evidence Act 1950, s. 108

Federal Constitution, art. 121(1A)

Rules of the High Court 1980, O. 71 r. 25, O. 72, O. 92 r. 4

Syariah Court Civil Procedure Act 1998, s. 7

Syariah Court Evidence (Federal Territories) Act 1997, s. 80
Syariah Evidence Enactment (Negeri Sembilan), s. 80

Evidence Act 1872 [India], ss. 107, 108, 109

Other source(s) referred to:
Halsbury's Law of England, 4th edn, vol 17, p 85, paras 115-116
Sir John Woodroffe & Syed Amir Ali, *Law of Evidence*, 16th edn, p 2605
Sarkar on Evidence, 15th edn 1999, pp 1553, 1555

For the petitioner - Haslinda Sakhroni (Ahmad Al-Turmizi Yusof); M/s Salman, Apandi, Mizi & Azmi

Reported by M Maheswaran

JUDGMENT

Heliliah Mohd Yusof J:

The applicant, Ridzwan bin Ibrahim, seeks a declaration that one Sheikh Mohamed bin Sheikh Ali who has not been heard of or seen for more than seven years by those who would naturally have heard of him if he had been alive, be presumed dead. The application pertains to s. 108 of the Evidence Act 1950 which provides as follows:

> 108. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

At the outset it is noted from the affidavit that the applicant was a relative of the person in respect of whom the presumption of death was sought for and it was only upon further direction that the supplementary affidavits were filed in order to explain the position of the applicant and Sheikh Mohamed bin Sheikh Ali.

The affidavit evidence discloses that Ridzwan bin Ibrahim is the grand nephew of Sheikh Mohamed bin Sheikh Ali. The father of the applicant, Ibrahim bin Ahmad, has since died on 15 October 1996. According to exh. R1, Ibrahim, the father of the applicant, is the only son of Sheikh Ahmad bin Sheikh Ali and Sheikh Ahmad is the only brother of Sheikh Mohamed bin Sheikh Ali, the other sibling being only a sister. Sheikh Mohamed bin Sheikh Ali in respect of whom the presumption of death is to be made, has left a piece of land held under Geran 17316 Lot 22 Mukim Port Dickson, Negeri Sembilan and a movable property equivalent to RM383,330 an amount representing payments for certain land that had been acquired in Mukim Port Dickson. The affidavit avers that Sheikh Mohamed bin Sheikh Ali has been domiciled in Saudi Arabia round about 1957 onwards. Sheikh Ahmad bin Sheikh Ali, the grandfather of the applicant was before his demise domiciled in Malaysia and died in Port Dickson and a copy of the certificate of death discloses that he

died on 30 May 1963 in Kampung Arab, Port Dickson. According to another certificate of death, Mariam bt Sheikh Ali, the only sister of the two brothers Sheikh Ahmad bin Sheikh Ali and Sheikh Mohamed bin Sheikh Ali, died on 9 February 1969 in Kampong Arab, Negeri Sembilan.

According to the affidavit of the applicant, Sheikh Mohamed bin Sheikh Ali has also acquired the citizenship of Saudi Arabia and has four daughters namely Rafeah, Khadijah, Mariam and Fatimah. Further, the affidavit shows that while Sheikh Ahmad bin Sheikh Ali and Mariam bt Sheikh Ali have all along been domiciled in Malaysia, Sheikh Mohamed bin Sheikh Ali, having left Malaysia around about 1957, has not since then been returning to Malaysia. The affidavit further discloses that the father of the applicant had been attempting to obtain letters of administration in respect of the assets of Sheikh Mohamed bin Sheikh Ali. Although it is generally stated that Sheikh Mohamed bin Sheikh Ali has died in Hijaz in 1973 no documents have been available to determine the date of his demise. However, there is a declaration by one Safar bin Mohammad bin Abdullah Al Qare'e Al Ghamdi made before the Pemungut Hasil Tanah Port Dickson, Negeri Sembilan on 3 February 1979 to the effect that he is the representative for the daughters of Sheikh Mohamed bin Sheikh Ali as aforementioned whereby the daughters have agreed that the property that have been inherited by Sheikh Mohamed bin Sheikh Ali were to be devolved upon "waris-waris Sheikh Ali bin Sheikh Mohamed bin Safar Al Ghamdi yang bermastautin di Malaysia."

Another affidavit has disclosed that the cousin of the applicant namely Mohamed @ Omar bin Sheikh Abdul Hamid, a Malaysian citizen deposed to the fact that Sheikh Mohamed bin Sheikh Ali had been in Malaysia prior to 1957 and having left Malaysia had not returned. According to the same affidavit, one Mohamed Safar bin Mohamed, a son-in-law of Sheikh Mohamed bin Sheikh Ali, had been in Malaysia in 1979 on behalf of the four daughters of Sheikh Mohamed bin Sheikh Ali for the purpose of settling matters pertaining to the property of Sheikh Mohamed bin Sheikh Ali. According to Mohamed @ Omar bin Sheikh A Hamid efforts to settle matters pertaining to the distribution of assets pursuant to the Small Estates Distribution Ordinance 1955 have not been successful as the total amount of the assets exceeded the jurisdiction of the Land Office. It was also deposed that an attempt to obtain the certificate of death by Ibrahim Ahmad in 1974 in respect of his granduncle in Jeddah was unsuccessful.

It is also disclosed that since then neither the applicant nor his cousins have received any information regarding Sheikh Mohamed bin Sheikh Ali who is alleged to have died sometime in 1973. The affidavit of another cousin of

the applicant that is Sheikh Mahmud bin Abdullah also disclosed that information about the demise of Sheikh Mohamed bin Sheikh Ali was obtained from a son-in-law Mohamed Safar bin Mohamed when the latter came to Malaysia in 1979.

It is very clear from the affidavits that the object of this application is to enable the applicant to pursue matters relating to the grant of letters of administration since Sheikh Mohamed bin Sheikh Ali would appear to have died intestate in respect of the land and a sum of money as stated above. Generally, the registrar will not allow any grant to be issued until after all inquiries which he may seem fit to make, have been answered to his satisfaction. Consequently, the petition may fail where the documents especially with regard to the death of Sheikh Mohamed bin Sheikh Ali is not produced. The general principle is that succession to the immovables of an intestate is governed by the law of the country where the immovables are situated. However, succession to the movables of an intestate is governed by the law of his domicile at the time of his death. The aforementioned principles are already enshrined in s. 4 of the Distribution Act 1958 (Act 300) but that Act does not apply to the estate of any persons professing the Muslim religion or affect any rules of Muslim law as varied by local customs in respect of the distribution of the estate of any such persons. Russel J in *Re Berchtold* [1923] 1 Ch 192 stated:

> It is conceded that where a conflict of laws arises on the death of an intestate the devolution of his immovables is governed by the *lex situs* … any devolution of his movables is governed by the *lex domicili.* It is further conceded that whether a particular property is a movable or an immovable is decided according to the *lex situs.*

At the time of the alleged demise of Sheikh Mohamed bin Sheikh Ali although he was domiciled in Saudi Arabia, there were immovable and movable property belonging to him situated in Malaysia. There is therefore a question to be determined that is whether under the intestacy of Sheikh Mohamed bin Sheikh Ali certain properties situated in Malaysia would devolve in accordance with the laws of Malaysia or in accordance with the laws of his domicile that is Saudi Arabia. However, at this stage of the proceedings, the applicant has not yet applied for letters of administration and no doubt at the time of such an application the fact that Sheikh Mohamed bin Sheikh Ali is a Muslim and last domiciled in Saudi Arabia, will have to be taken into account at the time of the inquiry by the registrar. An inquiry about the person who will be entitled to be granted the letters of administration will invariably arise during the course of the inquiry to be made by the registrar pursuant to O. 71 r. 25 of the Rules of the High Court 1980.

No cases have been cited to this Court except *Re Gun Soon Thin* [1997] 2 CLJ (Supp) 53 and *Re A Penhas (deceased)* [1947] MLJ 78. For the purpose of the present application I do not find those cases useful. In the course of hearing the submissions by the applicant's counsel, I have been emphasising that s. 108 of the Evidence Act 1950 of Malaysia is not about a question of the distribution of assets but simply that if on the date an order is made by this court, a question is addressed as to whether a man is alive or dead so long as there is no dispute about the man being alive.

This is the purport of s. 108 which provides as follows:

> 108. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

This section is in *pari materia* with s. 108 of the Indian Evidence Act (1 of 1872). *Sarkar on Evidence* (15th edn 1999) at p. 1553 in referring to ss. 107, 108 and 109 Evidence Act of India states as follows:

> These two sections and s. 109 are found on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or circumstantial. Taylor says: "Other presumptions are found on the experienced continuance, on immutability, for a longer or shorter period of human affairs. When, therefore, the existence, of a person, or personal relation, or a state of things, is once established by proof, the law presumes, that the person, relation or state of things continues to exist till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question" (Tay s. 196). The principle of the continuance of things in the state in which they have once existed, has been embodied in s. 114, illus (d)
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> The principle discernible from a combined effect of in Sections 107 and 108 provisions has been summarised in the book, Sir John Woodroffe and Amir Ali's *'Law of Evidence,'* 15th Edn. (1991) at pages 672-673 thus:
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> > The principle of Section 107 is that when once a state of things is shown to exist, there is in law a presumption of its continuance for a period for which such state of things ordinarily lasts. This section is merely a deduction from this presumption. If a person is shown to have been alive within thirty years of the date on which the question whether he is alive or dead arises, there is a presumption of his being alive, and the burden of proving that he is dead lies on him who asserts that he is dead. But this presumption is rebutted, if it is shown that he has not been heard of for seven years by those who if he had been alive, would naturally have heard of him; and, on such proof being given the burden of

proving that he is still alive, is under Section 108, upon those who assert that he is alive. The presumption under Section 108 is as to the fact of death at the time the question was raised and not at any particular antecedent time. There is no presumption also to the cause and circumstances of the death.

Section 107 deals with the presumption of continuation of life, whereas Section 108 deals with the presumption of death. Section 108 enacts a proviso to Section 107 by specifying that when a person was continuously absent for seven years and he was not heard by his friends and neighbours he may be presumed to have died and the burden of proving that he is alive shifts on the person who alleges that he is alive. The presumption of continuance of life under Section 107 ceases at the expiration of seven years from the period when the person in question was last heard of. The presumption under Section 107 will apply when the question is whether a person was alive or dead and not where the question is whether the person was alive or dead on a particular date.

The Judicial Committee of the Privy Council, in the leading case *Lal Chand Marwari v. Mahant Ramrup Gir*, A [1926] PC 9, stated the law authoritatively thus:

> There is only one presumption, and that is when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof …

Now, upon this question there is, their Lordship are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England *(Rango Balaji v. Mudiyeppa)* and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* run as follows:

> If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.

> Following these words, it is constantly assumed – not perhaps unnaturally – that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be

> less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one 'of not less than seven years.

In *Halsbury's Laws of England*, 4th edn., vol. 17, p. 85, paras. 115 and 116 the law is stated thus:

> 115. Presumptions of life and death. – There is generally no presumption of law by which the fact that a person was alive or dead on a given date can be established, but the question must be decided on the facts of the particular case.
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> Certain exceptions to this general rule are provided by statute, and, in addition, where there is no acceptable affirmative evidence that a person was alive at sometime during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, there arises a rebuttable presumption of law that he died sometime within that period.

Further on at p. (1555) it is also stated in Sarkar as follows:

> It should be remembered that the presumption extends merely to the fact of death at the expiration of seven years; but not to the time of death at any particular period, ie there is no presumption that the death took place after the end of the period of seven years or at any other particular time within that period. A person asserting that death occurred at any particular time must prove it like any other fact (post). The mere fact that a person has not been heard of for seven years does not raise the presumption of death where the circumstances are such that it is not likely that he would or could have communicated with his home even if he were alive.

Since Sheikh Mohamed bin Sheikh Ali is a Muslim, there is another matter to be noted although not raised at all by counsel for the applicant that is whether this is a cause or matter which could fall within the jurisdiction of the Syariah Court of the Federal Territory of Kuala Lumpur. As was stated by Eusoff Chin J (as he then was) in *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan (No. 2)* [1991] 3 MLJ 487 with reference to art. 121(1A) of the Federal Constitution where the relevant part is as follows:

> The amendment made a major change in the jurisdiction of the High Courts and the lower courts which, effective from 10 June 1988, would appear to deprive State legislatures from conferring any jurisdiction and power on the High Courts or inferior courts which are the sessions or magistrates' courts. The amendment also appears to deprive the High Courts and the inferior courts

from exercising any jurisdiction and power conferred by state laws contained in their ordinance or enactments which existed before 10 June 1988 unless in respect of both situations Federal Law extends the jurisdiction and powers of the High Court or the Sessions Courts to include the exercise of jurisdiction and powers conferred by state laws on the High Court or inferior courts.

However, at the moment in respect of the High Court, there are provisions in Federal law, which for our purpose here, is Part II of the Courts of Judicature Act 1964, and in particular section 23 of that Act which confer jurisdiction on the High Court 'to try all civil proceedings'. Sections 23 and 24 of the Court of Judicature Act 1964 states: …

However, article 121(1A) states that the High Court and inferior courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

It is therefore necessary for the first defendant to show positively that the matter before me is one which is within the jurisdiction of the Syariah Court to inquire and to decide.

The Federal Constitution, Ninth Schedule List II – State List, specifically gives powers to State legislatures to constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matter included in this paragraph'.

Therefore, a Syariah Court derives its jurisdiction under a State law, (for Federal Territories – Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.

If State law does not confer on the Syariah Court any jurisdiction to deal with any matter stated in the State List, the Syariah Court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.

After having regard to the above, reference is to be made to the Ninth Schedule to the Federal Constitution. List 1 (Federal List) includes Item 4 which prescribes, *inter alia*, that "Civil And Criminal Law And Procedure And the Administration of Justice" are matters within Federal competence and in respect of which Parliament may make laws. Included in Item 4(e)(i) of the List 1 are the subject matters of probate and letters of administration as well as the law of evidence. However, Item 4(e)(ii) by its stipulation excludes matters concerning Islamic personal law in relation to the question of succession of testate and intestate property.

The jurisdiction of the Syariah Court in the Federal Territory is provided in the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) and s. 46(2)(b) of the Act provides, *inter alia*, as follows:

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:

(i) betrothal, marriage, 'ruju', divorce, nullity of marriage (fasakh), nusyuz, or judicial separation (faraq) or other matters relating to the relationship between husband and wife;

(ii) any disposition of, or claim to, property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;

(iv) the division of, or claims to, harta sepencarian;

(v) wills or death-bed gifts (marad-al-maut) of a deceased Muslim;

(vi) gifts *inter vivos*, or settlements made without adequate consideration in money or money's worth, by a Muslim;

(vii) wakaf or nazr;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

(x) other matters in respect of which jurisdiction is conferred by any written law.

From the above it is clear that the civil jurisdiction of the Syariah Court extends to matters which relate to the division and inheritance of testate or intestate property as well as the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled to.

Presently there is also already enacted the Syariah Court Evidence (Federal Territories) Act 1997 (Act 561) which is applicable in the Federal Territories of Kuala Lumpur and Labuan. Section 2 of the Act provides:

This Act shall apply to all judicial proceedings in or before any Syariah Court.

Section 80 of that Act provides as follows:

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for four years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

It would appear that the abovementioned s. 80 is identical to s. 108 of the Evidence Act 1950 except for the fact that the term of years stipulated under the Syariah Court Evidence (Federal Territories) Act 1997 is for a shorter period of time. Had this matter been an application relating to the disposition of property, I find that a question of jurisdiction would arise in view of s. 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993. That Act and the Syariah Court Civil Procedure (Federal Territories) Act 1998 (Act 585) would appear to have enabled a similar application for a presumption of death to be made in view of s. 7 of the Syariah Court Civil Procedure Act 1998 which states as follows:

7. Mode of beginning civil proceedings

(1) Subject to subsection (2) of any other written law, every civil proceedings in a Court shall be begun by summons.

(2) All proceedings in respect of any of the matters specified in the Second Schedule shall be begun by application.

The Second Schedule of that Act provides that proceedings to be begun by application includes an application for presumption of death. It would appear that presently there is a general law whereby an application could be made available under the Rules of the High Court 1980 for purposes of invoking a presumption under s. 108 of the Evidence Act 1950 which is the general law on evidence, and in the case of Muslims there is now by virtue of the Syariah Court Civil Procedure (Federal Territories) Act 1998, a specific procedure which is also applicable where a similar application for an order for presumption of death could be made before the Syariah Court.

With regard to statutory interpretation there is to be considered the principle of *generalia specialibus non derogant* which is applicable when the general Act is later than the special Act but here it would appear that the converse has taken place that is a general legislation under the Evidence Act 1950, relating to the presumption of death and there is now also in force a special Act, which is applicable only to persons professing the religion of Islam where the procedure under the specific Act could then be invoked by the applicant. In such a case according to DC Pearce on *"Statutory Interpretation In Australia"* (at p. 149) "it would be a matter relating to implied repeals that is summed up in the maxim *leges posteriores priores contrarias abrogant*: later Acts repeal earlier inconsistent Acts." Pearce referred to a statement of law that is found in *Goodwin v. Phillips* [1908] 7 CLR 1 per Griffith CJ as follows:

> … where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

However, Pearce has also pointed out that the application of this approach is not automatic. In the same case Barton J stated as follows:

> The court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the latter imply the repeal of an express prior enactment, i.e., the repeal must, if not express, flow from necessary implication.

Presently therefore Muslims may now have to countenance a choice of two options in respect of an application for presumption of death and with the consequential question whether the applicant in this case should therefore have made the application under the Syariah Court Civil Procedure (Federal Territories) Act 1998. This application for presumption of death has not been preceded with a petition for a grant of letters of administration in respect of land situate in Negeri Sembilan since according to the applicant the death certificate is not available and on that ground an application for letters of administration may not succeed. However, it is clear from the exhibits that the intention of the applicant upon obtaining an order of court will be as stated in exh. 2 where it is stated:

> Satu perintah anggapan kematian simati adalah diperlukan sebelum petisyen untuk surat pentadbiran simati difailkan kerana tiada sebarang dokumen yang sah berkenaan dengan kematian Sheikh Mohamed bin Sheikh Ali dapat dikemukakan.

Item 4(e) in List 1 as mentioned above also includes the subject matter of "probate and letters of administration" as matters within the competence of the Federal Legislature. It is perhaps for that reason that it is noted that the Syariah Court Civil Procedure (Federal Territories) Act 1998 does not incorporate provisions corresponding to O. 71 or O. 72 of the Rules of the High Court 1980. Thus, even if the applicant in this case were to obtain an order under the Syariah Court Civil Procedure (Federal Territories) Act 1998 for a presumption of death, matters of probate and letters of administration will still be dealt with by a civil court.

Upon perusal of s. 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 which provides the civil jurisdiction of the Syariah Court, as noted above the jurisdiction includes matters regarding the division and inheritance of testate or intestate property. The existing provisions of the Syariah Court Civil Procedure (Federal Territories) Act 1998 while it has included under s. 7 a provision for an application for presumption of death has therefore also to relate to matters which in pith and substance are matters within the jurisdiction of the Syariah Court. However, in the absence of specific provisions under the Administration of Islamic Law (Federal Territories) Act 1993 or the Syariah Court Civil Procedure (Federal Territories) Act 1998 concerning matters of probate and administration, the present situation is therefore that for purposes of probate and administration an applicant will still have to resort to the jurisdiction of a civil court and yet for purposes of division and inheritance of testate and intestate property or the determination of persons entitled to share in the estates of deceased Muslims the jurisdiction is now vested in the Syariah Court in the Federal Territory of Kuala Lumpur.

There is another aspect of the matter that could be considered (since the land is situate in Negeri Sembilan and matters of personal law and family law in Islam are matters subject to State Law). The State of Negeri Sembilan has in force the Administration of Islamic Law (Negeri Sembilan) Enactment 1991. It is observed that s. 41(2)(b)(viii) and (ix) are as follows:

> 41 (1) A Syariah High Court shall have jurisdiction throughout the State of Negeri Sembilan and shall be presided over by a Syariah High Court Judge.
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> (2) A Syariah High Court shall:
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> ...
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> (b) in its civil (Mal) jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:
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> (i) …
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> (ii) …
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> (iii) …
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> (iv) …
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> (v) …
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> (vi) …

(vii) …

(viii) division and inheritance of will or non-will property of Muslim; or

(ix) other matters in respect of which jurisdiction is conferred by any written law.

This is identical to s. 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993.

In addition, there is also in force in Negeri Sembilan the Syariah Evidence Enactment 1991 (No. 8 of 1991) which provides as follows:

> 80. Subject to Hukum Syarak and the provision of any other written law, when the question is whether a man is alive or dead, and it is proved that he has not been heard of for four years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

Thus s. 80 of the Syariah Evidence Enactment of Negeri Sembilan is also similar to s. 80 of the Syariah Court Evidence (Federal Territories) Act 1997 for Muslims in the Federal Territories of Kuala Lumpur and Labuan. However, there is no legislation in force that corresponds to the Syariah Court Civil Procedure (Federal Territories) Act 1998. Instead there is in force the Syariah Courts (Civil Procedure) Rules 1992 made pursuant to s. 98 of the Administration of Islamic Law (Negeri Sembilan) Enactment 1991. It is noted that the said Rules do not incorporate a provision that is similar to s. 7 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 and the related item in the Second Schedule of the Act regarding an application for a presumption of death. However, even if an order for a presumption of death had been available in Negeri Sembilan in the same manner as the procedure which had been provided in the Federal Territory, the Syariah Courts in Negeri Sembilan will similarly not be able to handle matters relating to probate and administration. It may be that if there are instances where the facts are such that a party does not need to apply for letters of administration, the case will not have to be brought before the civil court.

The question that is before me is not whether the applicant should apply for letters of administration in a court within the Federal Territory or in a court within the State of Negeri Sembilan particularly when the land is situate in Negeri Sembilan and not in Kuala Lumpur. In any case if the application for presumption of death is now been made under the general law as it is now before me, I find that there is no inconsistency in allowing s. 108 as found under the Evidence Act 1950 to be applied not only for the reasons given

above but also for the fact that the period stipulated under the Evidence Act 1950 is for a period longer than what is available under s. 80 of the Syariah Court Evidence (Federal Territories) Act 1997 or the Syariah Evidence Enactment 1991. Hence the period stipulated in the Evidence Act 1950 has more than amply provided a statutory period for the presumption to arise to satisfy the requirement. Although it may be academic in nature, it is interesting to observe a statement in Sir John Woodroffe & Syed Amir Ali's *Law of Evidence* 16th edn. At p. 2605 which is as follows:

> Sections 107 and 108 establish a uniform rule upon their subject-matter, both for Hindus and Mahomedans as will as all others. According to Hindu Law twelve years must have lapsed before an absent person, of whom nothing has been heard during this period, can be presumed to be dead. Among Mahomedans, the old Hanafi doctrine required that ninety years should have elapsed from the date of the birth of a missing person before his death could be presumed. The Maliki principle is now, however, in force among the Hanafis, namely, that if a person be unheard of for four years, he is to be presumed to be dead. Among the Shias, the period is ten years, and among the Shafees seven. Now, however, the rule contained in these sections, being a rule of evidence only, governs both Hindus and Mahomedans.

The only other consequential question arising out of this, which is hypothetical in nature for the moment, is whether the order of this court will be recognised by the Syariah Court in the event that proceedings are instituted in the exercise of its jurisdiction under s. 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993.

With regard to the evidence before me it is disclosed that efforts made by the father of the applicant to obtain the death certificate of Sheikh Mohamed bin Sheikh Ali (exh. RI3) has failed. I am also asked to infer from exh. RI4 which discloses that the daughters of Sheikh Mohamed bin Sheikh Ali had made a disclaimer to the assets of Sheikh Mohamed bin Sheikh Ali that are situated in Malaysia and such conduct would not have been consistent with Sheikh Mohamed bin Sheikh Ali being alive.

This application having been received I have the option of not making an order in view of the existence of a similar provision under the Syariah Court Civil Procedure (Federal Territories) Act 1998 which would have enabled the applicant to obtain a similar order. However, as stated above if this application is entertained, I find that it is not repugnant to the implementation of that Act. Order 92 r. 4 of the Rules of the High Court 1980 states as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice.

In *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 Edgar Joseph Jr J (as he then was) stated, *inter alia*, as follows:

> The Rules of the High Court were enacted in exercise of the powers conferred by s. 17 of the Courts of Judicature Act, 1964, with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee and are comprised in P.U.(A) 50 which is clearly subsidiary legislation within the meaning of section 3 of the Interpretation Act, 1967. The Rules in my opinion, therefore, have statutory force and are not mere rules of practice.

This is the status of the rules which has remained unchanged. The inherent power that is invoked here is to do justice in the sense of overcoming a multiplicity or duplicity of applications. If this application is denied it is found that the applicant may well have to apply to the Syariah Court Civil Procedure (Federal Territories) Act 1998. I find that in this specific instance no repugnance is done by construing that with the two legislation available in respect of an application for a presumption of death the implementation is to be harmonised rather than to construe that there is any inconsistency.

I find therefore that this application is to be allowed as the applicant may have to seek again the jurisdiction of a civil court in order to obtain the letters of administration.

Accordingly I rule that Sheikh Mohamed bin Sheikh Ali be presumed dead and the order sought for in para. (a) of encl. (1) only be granted. The other prayers are merely reasons for seeking the order.